



Montana Department of Transportation
PO Box 201001
Helena, MT 59620-1001

Construction Memorandum

To: District Construction Engineers

From: Paul Jagoda, P.E.
Construction Engineering Services Engineer

Date: June 10, 2004

Subject: Claim Process

The intent of this Construction Memo is to explain the new claim specification, Subsection 105.16, and substantial changes to the claim process contained within. Primary goals of the new specification are as follows:

- Clarify and streamline the claim process. Note that the Notice of Potential Claim requirement has been removed from the new specification.
- Emphasis on the resolution of issues at the earliest stage possible.
- Associate timelines with all steps of the new claim process, with 142 days the minimum and 246 days the maximum. The current claim process does not have time limits associated with all steps. Please note there are fixed timelines associated with Department responses in this new specification. Those timelines have to be met, and it is imperative that we educate all personnel about these new requirements.
- Incorporate other recommendations made during the Legislative Audit's review of our existing claim process, such as a claim tracking system and database.

The following are excerpts from the new specification, and commentary on those excerpts:

105.16.1 paragraph #1: "...disagreements that are to be the subject of a claim":

The previous specification made reference to notice by the contractor of potential problems or disputes along with disagreements. With adoption of this specification comes the recognition that problems and disputes arise on projects routinely, and through the efforts of the MDT Project crew and the contractor these issues are usually resolved at the project level before they rise to the level of disagreement. When a problem or dispute is unresolved it becomes a disagreement, and the written notice is to occur. The Project Manager is to continue to seek resolution after the written notice, and has the responsibility of responding in writing to the written notice within 14 calendar days.

105.16.1 paragraph #1: "Include in the notice of claim all documentation showing the history of the disagreement."

A primary intent of the new claim process is to bring other Department resources into the process early so they may assist in timely resolution and processing of claims. This documentation is intended to help those not involved on the project on a daily basis to understand the progression of a problem or dispute into a disagreement. It also documents that all parties followed contractual timeframes.

105.16.1 paragraph #3: "Failure to timely provide the written notice as required waives the Contractor's right to make any claim for the disagreement."

The written notice of a claim should not be the first step of a problem or dispute resolution. It is the point that a problem or dispute has escalated to a disagreement. The project crew and contractor are expected to work together to inform each other of problems and disputes and work towards solutions before it reaches the point of written notice of claim. If the project crew is not notified of a problem or issue in a timely manner the department does not have a chance to mitigate costs or resolve the issue in a manner that may be the most beneficial to all parties. The stage of issue resolution where evaluation, research, cost/benefit analysis and decision making is conducted is essential.

CSB105.16(Claims_6-10-04)

105.16.2 paragraph #1: *"If an agreeable resolution is not reached within 14 calendar days of the written notice, the Contractor may submit a Certified Claim.."*

When a disagreement reaches a point of impasse the Certified Claim process begins.

105.16.2 paragraph #8: *"Do not change the basis of a claim after submitting the written notice. Do not supplement a faulty submission to rebut or dispute a decision made by the Project Manager. Claims that have changed in basis or that have been supplemented due to an original faulty submission will not be considered, and are waived by the Contractor."*

If the basis of the claim changes, a new certified claim must be submitted because it is in fact a different claim. This paragraph is intended to assure the Department has timely notification of a dispute or problem and has the opportunity to conduct an investigation to determine the best course of action, and is working to resolve the actual issue. This is also to address an unclear, ambiguous or faulty written notice or Certified Claim being submitted, followed by a new written notice or Certified Claim that supplements the original submission with the intent of bypassing the specified timelines.

Following are items that are used in the claim process by the department but may not be included in the claim specification:

Claim Assistance Team:

The Claim Assistance Team is a resource to assist with claims. This team can be activated at any time, but usually starts at the Certified Claim submittal. This team usually consists of the EPM, DCE, Construction Engineering Services (CES) Engineer, Construction Administration Services (CAS) Engineer, Construction Engineer, District CES Reviewer, Legal, and District FHWA Operations Engineer. Also included for technical assistance on an as-need basis are the Materials Engineer, Geotechnical Engineer, Bridge Engineer, Audit, Environmental, etc.

Submission of the District Claim Packet:

The claim packet is to be submitted to the CES Engineer by the DCE within 15 days after the Request of Appeal. This claim packet is to include the original claim, all supporting documentation or evidence and the District's evaluation and recommendation. The claim packet should be started at the beginning of the claim process and items added throughout the process. Copies of old claim packets are available for use as examples of acceptable format of the packet. The CES Engineer will use the claim packet to conduct additional research and develop a summary of findings with which to make a recommendation to the Board. Copies of the claim packet, CES Engineer's summary of findings and recommendation will be submitted to each Board member a minimum of 15 days prior to the Board meeting.

Claims database and tracking system:

The claims database and tracking system is currently being refined. In the future the tracking system will have the capability to prompt staff on critical dates and the entering of claim data. The database is used to store historical claim data and will have search/query capabilities to assist in future claims, research problem areas and trends and assist in determining where training or changes are needed.

The following attachments are included:

- #1: The new claim specification.
- #2: Explanation of terms (these are not part of the specification, and do not amend them).
- #3: New claim forms.
- #4: Flow chart for the new claim specification.

For additional information, please contact your District's Construction Engineering Services Reviewer or me.

This memo is rescinded five years from the date of issuance if not updated.

CC:	EPMs	District Office Engineers	CES Bureau	Lisa Durbin, PE
	Mark Wissinger, PE	FHWA Operations Engineers	Joel Marshik, PE	DAs
	Steve Garrison	Kent Barnes, PE	Scott Barnes, PE	Suzy Althof
	Bureau Chiefs	Jim Walther, PE		

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Attachment #1: New Claim Specification

Add the following new Subsection:

101.82.1 Business Day. All days are considered business days except Saturdays, Sundays and holidays.

Rescind Subsection 105.16 and replace with the following:

105.16.1 Notice of Claim. Notify the Project Manager in writing by no later than the next business day of disagreements that are to be the subject of a claim for additional compensation, time extension, contract change, or other remedy. Provide full details in the written notice why additional compensation, time extension, contract change, or other remedy is warranted. Include in the notice of claim all documentation showing the history of the disagreement.

Upon submission of the written notice, immediately begin keeping and maintaining complete and specific daily records using the Department's "Claim Cost Record" (Form CSB105.16.1) of all details and costs directly related to the disagreement. The form is available from the Project Manager or the Department's website. Base equipment costs on internal rates for ownership, depreciation, and operating expense. Provide the Project Manager with updates of details and costs related to the disagreement as they develop.

Failure to timely provide the written notice as required waives the Contractor's right to make any claim for the disagreement. Ensure that any notice of disagreement is fully and completely explained and documented, as the Department expects and requires early notice to mitigate costs and to fully document any potential costs.

The Project Manager will attempt to resolve the disagreement after the written notice is submitted. The Project Manager will issue a written response no more than 14 calendar days after receipt of the written notice.

105.16.2 Submission of Certified Claims. If an agreeable resolution is not reached within 14 calendar days of the written notice, the Contractor may submit a Certified Claim using the "Certified Claim" (Form CSB105.16.2) to the Project Manager no more than 7 calendar days after receipt of the Project Manager's response. The form is available from the Project Manager or the Department's website. Include all Claim Cost Records to date with the Certified Claim. Provide copies to the District Construction Engineer and the Construction Engineering Services Engineer of the Engineering Division. The Project Manager will continue to attempt to resolve the disagreement after the Certified Claim is submitted.

Detail the following in the Certified Claim:

- A. Reasons for each requested remedy, referenced to the applicable Contract provisions;
- B. Objections to the Project Manager's response;
- C. Basis for and amount of any additional compensation, extension of time, contract change, or other remedy, including any potential solutions.

The prime contractor must verify the claim data and certify the claim, whether originating from the prime contractor, subcontractor, supplier or materialman, for the Department to consider it. Only the prime contractor may submit the Certified Claim.

Failure to timely submit the completed Certified Claim form and the Claim Cost Records as required is a material breach of contract and waives the Contractor's right to make any claim for the disagreement or be entitled to any compensation, time extension or contract change related to the disagreement.

Allow the Project Manager access to and provide copies of all records when requested by the Department. Make other project records available for technical and audit evaluation during the project and after the claim-related work has been performed. Promptly furnish written clarification and any additional information or data requested by the Department.

After the Certified Claim is submitted, continue keeping and maintaining complete and specific daily records using the Department's "Claim Cost Record" form of all details and costs directly related to the claim. Base equipment costs on internal rates for ownership, depreciation, and operating expense.

Submit claim updates every month until the claim is resolved. Include all costs incurred and any other pertinent information discovered after the Certified Claim was submitted, and include copies of all Claim Cost Records for that month.

Do not change the basis of a claim after submitting the written notice. Do not supplement a faulty submission to rebut or dispute a decision made by the Project Manager. Claims that have changed in basis or that have been supplemented due to an original faulty submission will not be considered, and are waived by the Contractor.

The Contractor waives the claim and any compensation, time extension or contract change by:

- A. Not filing a timely, complete written notice;
- B. Not submitting a timely and complete Certification of Claim form;
- C. Not submitting monthly claim updates as required;
- D. Not keeping and submitting timely and complete Claim Cost Records.

105.16.3 Decision on Claims. The District Construction Engineer will provide a written decision no more than 30 calendar days after receipt of the Certified Claim. If additional time is required to research and evaluate the Claim, the District Construction Engineer can extend the time period 14 calendar days by notifying the Contractor in writing.

To advance the claim, appeal the District Construction Engineer's decision to the Board of Contract Appeals (Board). Submit the appeal by letter to the Construction Engineering Services Engineer no more than 30 calendar days after receipt of the District Construction Engineer's decision. Provide a copy of the appeal to the District Construction Engineer. The District Construction Engineer's decision is final unless appealed no more than 30 calendar days after receipt of the decision. If appealed, the District Construction Engineer will forward the original claim, supporting documents or evidence, and the District's evaluation to the Construction Engineering Services Engineer.

If the District Construction Engineer denies the Certified Claim, the Contractor may request a non-binding, independent third party mediation to the Construction Engineer of the Engineering Division. The request for third party mediation must be submitted in writing no more than 30 calendar days after the date of the Contractor's appeal. The Contractor and the Construction Engineer must mutually agree to the mediator and schedule the mediation date within 14 days of the request for mediation or the claim will proceed to the board. All costs associated with mediation will be shared equally between the Contractor and the Department. Mediation does not suspend the contractor's requirement to continue submitting monthly updates and maintaining the required cost records. Claims undergoing third party mediation will not be submitted to the Board unless the mediation is unsuccessful.

The Construction Engineering Services Engineer will submit the claim to the Board. Board meetings are scheduled on a quarterly basis, with the schedule available on request from the Construction Engineering Services Engineer. Claim appeals received less than 60 days in advance of the next scheduled Board meeting may not be presented to the Board until the following scheduled meeting.

The Board will only review those documents and evidence submitted in the original claim, its supporting documents, and the District's evaluation, but may request further information from the District Construction Engineer or the Contractor.

The Board may affirm, overrule, or modify, in whole or in part, the decision of the District Construction Engineer. The decision of the Board is the final decision.

108.07.5 DELAY COMPENSATION

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Add the following at the beginning of the first paragraph:

Requests for any compensation for delay under this provision must fully comply with the provisions of Subsection 105.16, in addition to the following requirements.

101.11 BOARD OF CONTRACT APPEALS

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x-x-04

Rescind subsection 101.11 and replace with the following:

101.11 BOARD OF CONTRACT APPEALS. The Board consists of the Chief Engineer, the Preconstruction Engineer and the Chief Counsel, with the Construction Engineering Services Engineer as Secretary to the Board. The FHWA Field Operations Engineer and Construction Engineer are non-voting members.

Attachment #2: Claim Terms

Disagreement: The point where a problem or dispute appears unresolved.

Notice of claim: A disagreement is unresolved; the beginning of the claim process.

Mediation: Attempt to resolve a disagreement by using an independent third party.

Resolution: A solution agreeable to both parties is reached.

Impasse: Resolution does not appear likely, even if it only appears that way to one party.

CSB105.16.1(Claim_Cost_Record_6-10-04): Form used to track costs associated with a disagreement that are subject to a claim or a claim.

CSB105.16.2(Certified_Claim_6-10-04): Form used to submit and document the claim.

Basis of a claim: The facts upon which a claim is submitted.

Faulty submission: A submission that does not comply with the time or content requirements of a specification.

CLAIM COST RECORD

DAILY RECORD OF LABOR, EQUIPMENT, AND MATERIALS

PROJECT _____

FOR DATE _____ DATE OF NOTICE _____

LOCATION AND DESCRIPTION OF CLAIM-RELATED WORK

(Describe work and operations covered by report and also location by structure or station. Make out separate form for each location involved)

[illegible]

MATERIAL

[illegible]

EQUIPMENT

[illegible]

CLAIM COST RECORD
RECORD OF OVERHEAD, MARGIN, AND OTHER INDIRECT CHARGES

PROJECT _____

DATE _____ DATE OF NOTICE _____

(List each item by name, identify to which costs and in what amount it is applied. Explain what it includes and how it is derived.)

1.

2.

3.

CLAIM COST RECORD
EQUIPMENT CHARGE RECORD

PROJECT _____

DATE _____ DATE OF NOTICE _____

(List each piece of equipment used in work involved in claim by type, make, model, year and serial number. List rate for each and statement as to what is included and how it is derived.)

1.

2.

3.

Under penalty of law for falsification, the undersigned

_____, _____ of
(name) (title)

_____, hereby certifies that the costs listed herein
are true and were incurred as stated herein.

Dated this _____ day of _____, 200_____.

(s) _____

Subscribed and sworn to before me this ____ day of _____, 200_____.

Notary's printed name

Notary Public for the State of

Residing at _____

My commission expires _____

Montana law provides:

45-7-210. False claims to public agencies. (1) A person commits an offense under this section if he purposely and knowingly presents for allowance or for payment any false or fraudulent claim, bill, account, voucher, or writing to any public agency, public servant, or contractor authorized to allow or pay claims presented to public agencies if genuine. (2) (a) Except as provided in subsection (2)

(b), a person convicted of an offense under this section shall be fined not to exceed \$500 or imprisoned in the county jail for a term not to exceed 6 months, or both.

(b) If false or fraudulent claims are submitted purposely and knowingly as part of a common scheme or if the value of the claim or the aggregate value of all claims exceeds \$300, a person convicted of an offense under this section shall be fined not to exceed \$10,000 or imprisoned in the state for a term not to exceed 10 years, or both.

17-8-231. Liability for false claims. (1) A person who knowingly presents or causes to be presented a false, fictitious, or fraudulent claim for allowance or payment to any state agency or its contractors forfeits the claim, including any portion that may be legitimate, and in addition is subject to a penalty of not to exceed \$2,000 plus double the damages sustained by the state as a result of the false claim, including all legal costs.

(2) The forfeiture and the penalty may be sued for in the same suit.

**CERTIFIED CLAIM
MONTANA DEPARTMENT OF TRANSPORTATION**

CSB105.16(Claims_6-10-04)

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**CERTIFICATION OF EACH PART OF A CLAIM IS AN ABSOLUTE
PREREQUISITE TO A CLAIM BEING CONSIDERED BY THE DEPARTMENT
DO NOT ALTER THE LANGUAGE OF THIS FORM!**

PROJECT NAME

PROJECT NUMBER

THIS CLAIM IS SUBMITTED ON BEHALF OF (check each that applies):

____ Prime Contractor ["Contractor"]

____ Subcontractor(s) [specify which] _____

Anyone knowingly presenting a claim, any part of which is found to be false, fictitious or fraudulent, is subject to the criminal penalties of §45-7-210, MCA, and civil liabilities of §17-8-231, MCA, in addition to criminal and civil penalties applicable under Federal law.

Contractor understands and agrees that, under its Contract with Department, it must certify any claim, and that any failure to fully certify the claim as here required is a failure to resort to and complete the Department's procedure for dispute settlement, and bars further administrative or judicial review of the claim.

Understanding the above, and with the intent to obtain the claimed amount from the State, the Contractor by the undersigned certifies that:

- a this claim is made in good faith;
- b Contractor has fully reviewed the claim and its supporting data, including its project records (and the project records of any subcontractor involved in the claim) to ensure that any personnel and equipment items listed in the claim are properly included;
- c the supporting data are accurate and complete to the best of Contractor's knowledge and belief, and support that all personnel and equipment items listed in the claim are properly included;
- d no part of the claim is false, fictitious or fraudulent; and,
- e the amount requested, as shown on the attached pages, accurately reflects the contract adjustment for which Contractor believes the State is liable, and is a complete statement of the claim.

Name of Contractor

By: _____
Contractor's Representative

Date

Representative's Title

TO: _____, Project Manager
Montana Department of Transportation

CSB105.16(Claims_6-10-04)

Date Of Notice of Claim (reference 105.16.1): _____

Project Name: _____ No: _____

A notice is required for each separate claim that may be filed (only one claimed condition or event per Notice). Additional pages will be attached if required.

In accordance with Subsection 105.16 (as amended), notice is hereby given of the following claim for additional compensation, additional time, etc., for this Project:

1. **Conditions.** (Describe fully the physical condition, engineer's orders, directives or actions or other conditions that directly contribute to the claimed problem.)

-
2. **Date of Contractor's Discovery of the above-stated Condition:** _____
Explain and include all documentation showing the progression and history of the disagreement into a claim, including correspondences. _____

3. **Plans and Specifications.** (Describe fully the claimed specifications that are in conflict or are unclear or ambiguous; or the claimed conflicts or errors in the plans.)

-
4. **Other Condition or Occurrence.** (Describe fully.)
-

The following portions of work and operations will be affected (attach pages if needed):

1. **Portions of work.** (Describe fully the contract items, and locations by station or structure.)

2. **Operations.** (Describe specific operations that will be affected for each location involved. Also, **immediately submit a revised operation schedule showing impact on the activities.**)

Contractor's objections are: (State in detail the specific objections to performing work for the compensation stated in the contract, or within the time required, or other objections.)

Contractor believes the nature and amount of the adjustment in compensation or extension of time that is due or may be due is as follows: (Describe fully and specifically.)

Signature & Date

Title

Contractor Submitting the Notice

Prime Contractor Superintendent & Date
(Required if Notice is from a subcontractor)

If a subcontractor submits the Notice, it must be submitted through the Prime Contractor.

Note:

All forms on these pages are MDT-required formatting, and they may be downloaded for use by contractors. These forms are required by specifications for their particular use, just as they are. Use of a downloaded form is deemed an agreement by the user that the form will be used exactly as-is. If one of the forms is to be submitted back to the Department (e.g., as part of a claim, etc.), its language is **not** to be changed in any way as the Department's specifications and procedures rely upon the language of the standard forms. If language of one of these forms, that is submitted to MDT, is found to have been altered in any way, the form will automatically be rejected for its intended purpose. It will also be a breach of contract by the firm/person that submitted it, and the alteration may be brought to the attention of the Transportation Commission.

CC: District Construction Engineer
Construction Engineering Services Engineer

